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In The

Supreme Court of the United States

October Term, 1970

~~No. 1647~~ 70-322.

In the Matter of the Imprisonment of

William B. Warren,

Petitioner.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, TO PETITION FOR WRIT OF CERTIORARI

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In The

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner originally filed a Petition for Writ of Habeas Corpus in the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, which was denied in a Judgment dated December 4, 1970, by the Honorable Marvin K. Blount, Jr., Judge Presiding. Petitioner then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals which was denied by Order of the Court in Conference on March 2, 1971. The Petitioner then filed an Application for Writ of Certiorari in the Supreme Court of North Carolina which was denied by that Court in Conference on April 6, 1971. Copies of the Judgment of the Caswell County Superior Court, as well as the Orders of the Court of Appeals and Supreme Court of North Carolina are appended to Petitioner's Petition.

From the Judgment below, Petitioner has filed this Petition for Writ of Certiorari to the Supreme Court of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

WHETHER THE PAROLE OF A PAROLEE FROM A STATE CORRECTIONAL INSTITUTION CAN BE REVOKED WITHOUT NOTICE AND HEARING, CONSISTENT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

General Statutes of North Carolina:

N.C.G.S. 148-61.1

"Revocation of parole by Board; conditional or temporary revocation.—(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee. The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his sentence, and if any parolee shall have his parole revoked, he shall thereafter be returned to the penal institution having custodial jurisdiction over him.

(b) The Board of Paroles may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time. Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer. After such conditional or temporary revocation of parole, the parolee shall be held for a reasonable length of time during which the Board of Paroles shall determine whether or not the conditions of said parole have been violated. If it is determined by the Board of Paroles that the conditions of said parole have been violated, the Board of Paroles may in its discretion revoke the order of parole. If it is determined by the Board of Paroles that there has been no violation of the conditions of said parole, then such parolee or paroled prisoner shall be reinstated upon his original parole."

STATEMENT OF THE CASE

The Petitioner was convicted on June 13, 1969, in the Alamance County Superior Court, upon his plea of guilty to a charge of embezzlement and was sentenced to a term of imprisonment of not less than 2 nor more than 5 years. On December 16, 1969, the North Carolina Board of Paroles issued its Certificate of Parole to the Petitioner paroling him to parole supervision in Durham County, North Carolina. The Certificate of Parole expressly provides that, "under § 148-61.1 of the General Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof." (A. p. 9). On December 19, 1969, the Petitioner executed a parole agreement between the North Carolina Board of Paroles and William B. Warren, Parolee, which expressly provides, "I understand that should I violate parole the Board of Paroles may cause me to be returned to prison without notice and without hearing." (A. pp. 10, 11).

On April 8, 1970, based upon reports submitted to the

Board of Paroles by its professional staff, the Board of Paroles issued its *Revocation of Parole and Warrant for Arrest.* (A. p. 12). Petitioner was thereupon taken into custody and recommitted to the North Carolina Department of Correction for the completion of the sentence from which he was paroled.

ARGUMENT

THE PETITIONER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO NOTICE AND A HEARING ON THE QUESTION OF REVOKING HIS PAROLE, AND, THEREFORE, N.C.G.S. 148-61.1 AS APPLIED TO THE REVOCATION OF PAROLE OF WILLIAM B. WARREN, IS NOT IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE NORTH CAROLINA AND UNITED STATES CONSTITUTIONS.

In 67 C.J.S. § 23, *Pardons*, at page 619, the applicable rule is stated:

> "The parolee has no constitutional right to a hearing on the question of revoking his parole; and, in the absence of a statutory provision for notice and hearing, a parole may be revoked without such notice and hearing, whether authority to revoke is granted in the Governor, the Court or Judge granting the parole, the Board of Parole, Prison Commissioners, or an adult authority."

In the State of North Carolina, the applicable statute, N.C.G.S. 148-61.1, provides:

> "(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee . . ."

The leading case on the subject is **ROSE v. HASKINS**, 388 F. 2d 91 (6th Cir. 1968). In **ROSE**, the Court quoted with approval the uniform rule stated in 67 C.J.S. § 23, *Pardons*, and went on to state:

> "The Supreme Court of the United States has held that

the privilege of a probationer is not a right guaranteed by the Constitution, but 'comes as an act of grace to one convicted of a crime and may be coupled with such conditions in respect of its duration as Congress may impose.' In the absence of statutory provision, the probationer is not entitled to a hearing on revocation. ESCOE v. ZERBST, 295 U.S. 490, 492, 493, 55 S. Ct. 818, 819, 79 L. Ed. 1566 (1935); BURNS v. UNITED STATES, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266 (1932). See also STATE ex rel HARRIS v. RAGEN, 177 F. 2d 303 (7th Cir. 1949)."

Moreover, in ROSE, supra, the Court stated:

"Under Ohio law, the 'trustee' and 'parolee' have privileges, not rights, until they have served their sentences. The Parole Commission may declare a prisoner, who has been paroled, a violator when in its judgment he has violated the conditions of his parole. The Commission has exercised its judgment in this case. It declared Rose a parole violator. It was not required to provide a hearing . . ."

In PEOPLE ex rel JOHNSON v. FOLLETTE, 295 N.Y.S. 2d 565 (1968), the Court stated that:

"A number of cases have held that the Constitution does not even require a hearing in order to revoke parole. See EASON v. DICKSON, 9 Cir., 390 F. 2d 585; ROSE v. HASKINS, 6 Cir., 388 F. 2d 91, cert. dnd. 392 U.S. 946, 88 S. Ct. 2300, 20 L. Ed. 2d 1408; WILLIAMS v. DUNBAR, 377 F. 2d 505. Thus, while it is permissible to make a statutory provision for a hearing, it is not constitutionally required (ESCOE v. ZERBST, 295 U.S. 490, 492-493, 55 S. Ct. 818, 79 L. Ed. 1566) . . ."

When this issue was raised in DUNN v. CALIFORNIA DEPARTMENT OF CORRECTION, 401 F. 2d 340 (9th Cir. 1968), the Ninth Circuit Court of Appeals held that:

"A state prisoner's right to a parole is not one of the rights protected by the United States Constitution . . .

"There is no federally protected constitutional right to counsel or confrontation of witnesses in a parole revocation proceeding. EASON v. DICKSON, 390 F. 2d 585 (9th Cir. 1968); WILLIAMS v. DUNBAR, supra; HYSER v. REED, 115 U.S. App. D.C. 254, 318 F. 2d 225, 239 (1963)."

Similarly, when the issue was presented to the Sixth Circuit Court of Appeals in HINKLE v. OHIO PAROLE AUTHORITY, 419 F. 2d 130 (6th Cir. 1969), that Court held:

"A state is not required to provide for parole, and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Moreover, the parolee has no constitutional right to a hearing on the reason for revocation of parole. ROSE v. HASKINS, 388 F. 2d 91 (6th Cir. 1968); COX v. MAXWELL, 366 F. 2d 765, 767 (6th Cir. 1966)."

The Tenth Circuit Court of Appeals had an opportunity to review a similar contention in EARNEST v. WILLINGHAM, 406 F. 2d 681 (10th Cir. 1969), and stated that:

"Early release of prisoners, be it mandatory release, parole or probation, and revocation hearings are matters of legislative grace not constitutionally mandated."

The Sixth Circuit Court of Appeals was once again presented with the issue in ALLEN v. PERINI, 424 F. 2d 134 (6th Cir. 1970), and once again concluded that:

"A final question is whether ALLEN was entitled to a hearing on the revocation of his parole . . . This issue was foreclosed adversely to petitioner by the decision of this Court in ROSE v. HASKINS, 388 F. 2d 91 (6th Cir.). See also BARNHART v. MAXWELL, 2 Ohio St. 2d 308, 310, 208 N. E. 2d 752."

In an opinion handed down on April 5, 1971, the Massachusetts Supreme Judicial Council also had an opportunity to review this contention. In BAXTER v. COMMONWEALTH, Mass. , 268 N. E. 2d 670 (1971), the Supreme Judicial Council held that parole is a privilege and that the revocation of this privilege is within the discretion of the Parole Board and, therefore, there is no constitutional right to a hearing before it is revoked.

On April 21, 1971, the Eighth Circuit Court of Appeals once again reaffirmed the proposition that the due process clause of the Fourteenth Amendment does not require that a hearing be granted on revocation of parole. MORRISEY v. BREWER, F. 2d (8th Cir. 1971), 9 Cr. L. 2083 (May 5, 1971).

However, subsequent even to the above cited line of authority, and decided without knowledge of the Petitioner, the Fourth Circuit Court of Appeals (which encompasses the State of North Carolina), decided, on June 10, 1971, *en banc*, the consolidated cases of BEARDEN v. SOUTH CAROLINA, F. 2d (4th Cir., No. 14,079, June 10, 1971) and MIDGETT v. COX, F. 2d (4th Cir., No. 14,197, June 10, 1971). In BEARDEN, the Fourth Circuit Court of Appeals held that:

> ". . . due process and fundamental fairness dictate a holding that within a reasonable period after arrest upon such a warrant the parolee is entitled to notice of his alleged default and opportunity to rebut the same, including the right to be heard pro se before someone representing the Board, and to present voluntary witnesses in his own behalf . . ."

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in BEARDEN v. SOUTH CAROLINA, supra, is in conflict with the decisions of the Sixth Circuit Court of Appeals in ROSE

v. HASKINS, supra, HINKLE v. OHIO PAROLE AUTHORITY, supra, and ALLEN v. PERINI, supra; the Seventh Circuit Court of Appeals in STATE ex rel HARRIS v. RAGEN, supra; the Eighth Circuit Court of Appeals in MORRISEY v. BREWER, supra; the Ninth Circuit Court of Appeals in DUNN v. CALIFORNIA DEPARTMENT OF CORRECTION, supra; the Tenth Circuit Court of Appeals in EARNEST v. WILLINGHAM, supra; and the decisions of the highest courts of many of the states.

In view of the foregoing, the Respondent respectfully joins with the Petitioner and prays that this Court grant a Petition for Writ of Certiorari so as to resolve the conflict now existing between the various circuits.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

Certificate of Parole

STATE OF NORTH CAROLINA

TO THE N. C. DEPARTMENT OF CORRECTION:

William B. Warren, W/M, Age 39, at the June, 1969 Term,
W0663-785-10730-32
Superior Court of Alamance County,
was convicted of Embezzlement

and sentenced to serve 2 - 5 years

After having made a careful investigation of this case, the Board of Paroles is of the opinion that the best interests of the public and of the inmate will be served by his release under supervision at this time.

Therefore, in accordance with the provisions of Section 148-52 of the General Statutes of North Carolina, the Board of Paroles does hereby parole the said William B. Warren under the supervision of the Office of the Board of Paroles or its representatives, upon condition he obey the law and adhere strictly to the parole rules and regulations and the advice of supervising agents.

County of Supervision: Durham

P. I.

Under Section 148-61.1 of the General Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof.

This the 16th day of December, 19 69

BOARD OF PAROLES

Member
Robert Weinstein

Member
Foil Essick

P. B. FORM #101

STATE OF NORTH CAROLINA

PAROLE AGREEMENT BETWEEN THE NORTH CAROLINA BOARD OF PAROLES

AND William B. Warren PAROLEE
W0663-785-10730-32

In accepting this parole I understand that the North Carolina Board of Paroles may at any time for reason or reasons satisfactory to itself revoke, modify, or change its terms. I also understand that I am under the legal custody of the Board of Paroles until duly discharged by the Board. I understand that should I violate parole the Board of Paroles may cause me to be returned to prison without notice and without hearing. In accepting this parole I agree to abide by the following rules:

1. I will report promptly to my parole officer whenever instructed to do so and in the manner prescribed by my parole officer and the Board of Paroles.
2. I WILL NOT USE INTOXICATING BEVERAGES OR NARCOTICS WHILE ON PAROLE. (IT IS UNDERSTOOD THAT NARCOTICS PRESCRIBED BY A LICENSED PHYSICIAN MAY BE USED AS PRESCRIBED.)
3. I will obey all municipal, county, state, and federal laws, ordinances and orders and avoid people and places with bad reputations.
4. I will not leave my county of residence without obtaining permission from my parole officer. I will not leave the State of North Carolina without permission from the Board of Paroles.
5. I will work steadily at an approved job and not change jobs or residence without permission from my parole officer. If I am discharged from my job or evicted from my home, I will notify my parole officer immediately.
6. I will not own or operate any motor vehicle without permission from my parole officer.
7. I will not own or possess any firearms or deadly weapon without permission from my parole officer.
8. I will maintain steady employment and support any persons dependent on me to the best of my ability.
9. I will not visit any place where prisoners are confined or associate or communicate with inmates of penal institutions or persons having a criminal or police record without permission from my parole officer.
10. I will not marry or re-marry without permission from my parole officer.

11. I will not incur any u.. .cessary indebtedness or make any installment purchases or loans without permission from my parole officer.

12. I will allow my parole officer to visit and inspect my home or place of employment at any time and will answer all inquiries from the Board of Paroles or its agents truthfully and to the best of my ability.

13. I will report immediately to my parole officer any incident that might lead to my arrest while I am on parole.

14. I do hereby waive extradition to the State of North Carolina from any state of the United States and also agree that I will not contest any effort by any state to return me to the State of North Carolina.

15. I agree to abide by any special conditions the Board of Paroles deems necessary to the supervision of my case. If I am paroled or transferred to another state, I agree to abide by any parole rules in effect in that state.

I have read or have had read to me the foregoing conditions of my parole. I fully understand them and will strictly follow them.

DATE 12-19-69 SIGNED William B. Hayward

WITNESS [illegible] TITLE Parole Officer

The Board of Paroles realizes that under the American system compulsory church attendance may be regarded as infringement upon the idea of separation of church and state and therefore, does not include this as a specific condition of parole. However, the Board wishes the parolee to know that in its opinion no more important element enters into the proper rehabilitation of the individual than does religion. The Board strongly recommends to the parolee that he or she immediately upon release on parole communicate with a minister, priest, or rabbi of the parolee's choosing and secure the assistance of such person in helping work out the parolee's problems. The Board suggests to the parolee regular church attendance and active membership by the parolee in a church of the parolee's choice.

Ordinarily parole supervision will last at least as long as it would have taken you to complete your sentence by law. However, you must be on parole at least one year before you can be discharged. Very few with a good parole record are required to be on parole more than five years. If your parole is revoked, the time you are on liberty on a regular parole will not count as time served on your sentence.

Revocation of Parole
And Warrant for Arrest

STATE OF NORTH CAROLINA

TO ANY OFFICER AUTHORIZED BY LAW TO MAKE ARRESTS. GREETINGS:

WHEREAS William D. Warren, W/M (NCDC#63-705-10730-32), a parolee of the North Carolina State Prison or its Division, sentenced from Alamance County, in June, 1969 to serve a sentence of 2 to 5 years for the crime of EMBEZZLEMENT, and was thereafter on the 16th day of December, 19 69, granted parole and is now in the legal custody of the Board of Paroles; and

WHEREAS, the Board of Paroles, being informed that this parolee is not adjusting satisfactorily or has violated conditions of parole, and exercising its discretion, deems it for the best interests of society and the parolee that his parole be revoked.

NOW, THEREFORE, the Board of Paroles, by authority of Section 148-61.1 of the General Statutes of North Carolina does hereby revoke the parole of the said WILLIAM D. WARREN, WHITE - MALE, and authorizes and directs any officer authorized by law to make arrests to apprehend and take him into custody and hold him until the arrival of a duly authorized representative of the North Carolina Prison Department, who will take him into custody and return him to the Prison System for the completion of the sentence from which he was paroled.

By authority of Section 148-62 of the General Statutes of North Carolina, the remainder of the sentence from which was paroled is hereby ordered to run with the sentence of which commenced at the term, 19 , of the Court of County.

This the 7 9th day of April, 19 70

BOARD OF PAROLES

By: [signature]
Robert Bruce Jr., Director